95-1067

Supreme Court, U.S.
FILED
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No. 95-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

CLAYTON BAKER
SALLY I. BAKER
Petitioners,

vs.

INTERNAL REVENUE SERVICE
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

WILLIAM P. KOONTZ, ESQ.
811 EAST MAIN, SUITE E
COTTAGE GROVE, OR 97424
(503) 942-2984
Attorney for Petitioners

30pp

QUESTION PRESENTED

Petitioners respectfully seek the Honorable Court issue a Writ Of Certiorari, and review the judgment and order of the United States District Court for the District of Oregon and the United States Circuit Court of Appeals for the Ninth Circuit. Petitioners assert that the determination of both of the courts below has created a rule of law which effectively vitiates Federal Rule of Civil Procedure 60b.

> The lower courts erred in holding that 11 U.S.C. Section 505 (a) (2) (A) forbids a bankruptcy court from adjudicating a person's tax liability where such liability was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction. Petitioners entered into a stipulated decision of the United States Tax Court with reference to their tax liability for tax years 1975, 1976, 1977, 1978, 1979, and 1980. Said judgment was entered on April 10, 1991. However, the Petitioners did not receive their tax bill arising out of that decision until 1993.

> Petitioners in entering into that stipulation, made a bargain with the Internal Revenue Service. That bargain called for the Petitioner's to be given all legitimate deductions on the returns in question, to be given credit for investments made with Berg and Allen at the rate of 50%, to be given credit for tax preparation fees charged by Berg and Allen, and to have "side issues" resolved. Aside from the 50% credit, Petitioners never got the benefit of their bargain. They were not given credit for their legitimate deductions. No explanation was ever been furnished them why they were not.

To date no Court has wished to consider the question as to whether the Internal Revenue Service lived up to their bargain with the Petitioners, but relied on blind adherence to the principle of res judicata.

To determine whether the Internal Revenue Service lived up to their bargain with the Petitioners, it is necessary

to recompute the Petitioners' tax liability for the years in question. Until a court allows the Petitioners to reopen their tax liability for the years in question, it becomes impossible to show that the Petitioners were denied the benefit of their bargain.

In simple terms the question presented is whether 11 U.S.C. 505 (a) (2) (A), forbids a redetermination of a debtor's tax liability by a United States Bankruptcy Court when the Debtor (Petitioner) alleges that the amount claimed by the United States is incorrect because the United States has failed to live up to the terms of a bargain that it made with the taxpayer regarding the computation of the taxpayer's tax liability.

The United States Bankruptcy Court for the District of Oregon held that 11 U.S.C. 505 (a) (2) (A) expressly prevented it from determining the correct amount of the tax liability that the debtor owed to the United States. (Appendix A) The local United States District Court affirmed the decision of the Bankruptcy Court. (Appendix B). The Ninth Circuit Court of Appeals confirmed the decision of the United States District Court. (Appendix C).. Petitioner's bargain is contained in Appendix E.

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JUDGMENTS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit appears in Appendix C to this Petition. The decision of the United States District Court for the District of Oregon appears in Appendix B of this Petition. The stipulated decision between the Petitioners and the Commissioner of the Internal Revenue appears as Appendix D of this Petition. The bargain that Petitioners made with the United States appears as Appendix E of this Petition . Said bargain is contained as a matter of record in the U.S. Tax Court case of Gile v. Commissioner, docket number 15854-82, decided June 15, 1988.

JURISDICTION

In 1982, Petitioners and a host of other taxpayers filed suit in the U.S. Tax Court, having been assessed certain taxes as the result of fraudulent activities carried out without their knowledge by the law firm of Berg and Allen. In 1988, the Government and a host of defrauded taxpayers reached a bargain to resolve the individual cases. In 1991, Petitioners signed a stipulated decision with the United States that they believed reflected that bargain. In 1993, the United States

sent Petitioners a tax bill pursuant to that decision and Petitioners filed a bankruptcy petition in the U.S. Bankruptcy Court in Eugene, Oregon. In sorting out debts, Petitioners disputed the amount of money owed the United States. The Bankruptcy court refused to allow Petitioners to reopen the amount of money owed to the United States. This decision was affirmed by the District Court for the District of Oregon, and was subsequently reaffirmed by the Ninth Circuit Court of Appeals on January 12, 1996. Jurisdiction of this Honorable Court is properly invoked pursuant to 28 USC Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ....[N]or be deprived of life, liberty or property without due process of law

STATUTES

11 USC 505 (a) (2) (A) provides in pertinent part that a bankruptcy court may not determine:

> ...the amount or legality of a tax, fine, penalty, or

addition to tax, if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case under this title.

STATEMENT OF THE CASE AND BASIS FOR FEDERAL JURISDICTION

Petitioners cause of action arose as a result of a bankruptcy petition that they filed in Eugene, Oregon. Petitioners were forced into bankruptcy when they were presented with a staggering tax bill that exceeded their ability to pay.

The petitioners along with several hundred other innocent taxpayers were swindled and cheated by one Maxwell Berg, a California attorney who had set up a fraudulent tax shelter scam, with the full knowledge of the United States government. At no time were Petitioners or any other investors ever warned by the United States about the illegality of Maxwell Berg's scheme. Eventually the government moved against Maxwell Berg who fled the country, escaping to Canada. This occurred in the early 1980's. Petitioners and others cooperated fully with the

government's investigation of Berg. In 1982, Petitioners and other Berg victims were sent notices of deficiency by the United States to recoup the money that Berg had stolen from both the Petitioners and the government. Petitioners and several hundred other taxpayer banded together and retained one Jonathan Cole to represent them in tax court. A petition in that Court was filed on their behalf in 1982. The proceedings were put on hold while the United States pursued its criminal investigation of Berg. In 1988, Mr. Cole on behalf of the petitioners and other clients arrived at a settlements with the United States. His clients would receive among other things, a 50% credit for money invested with Berg, consideration of all side issues on the individual returns, and credit for tax preparation fees that they had paid to Berg.

In 1991, Petitioners finally received a stipulation from the United States that purported to have settled their obligations owed to the United States. Petitioners looked at the figures, assumed they were correct and signed the stipulation, which was converted into a judgment against them.

In 1993, Petitioners received a bill from the United States in the amount of $175,000.00. This amount stunned the petitioners, who did not have the resources to pay the

amount demanded. Petitioners were retired. In an effort to preserve their family home, Petitioners filed a bankruptcy proceeding. In the course of analyzing the petitioners debts, it became obvious that the government had not lived up to the deal that they made with petitioners.

Petitioners never got credit for a $25,000.00 casualty loss (independent of Berg) nor for tax preparation fees that they had paid to Berg. As a result the obligation due and owing the government was approximately three times what it should have been. Petitioners disputed the amount of the debt claimed by the United States. The bankruptcy judge concluded that she did not have the power to inquire into the legality of that debt since there was an adjudication of said debt by the United States Tax Court.

Petitioners asked the Court pursuant to F.R. Civ. P 60 (b) to set aside the judgment of the Tax Court and determine the true amount to the debt owed the United States. The Bankruptcy Court, the District Court, and the United States Court of Appeals for the Ninth Circuit, have all agreed that a stipulated decision of the Tax Court is "contested" and "adjudicated", and therefore a Bankruptcy Court is precluded by virtue of 11 U.S.C. Section 505(a)(2)(A) from making a redetermination of the Petitioner's tax debt.

REASONS FOR GRANTING THE WRIT

Petitioners respectfully suggest this Court should grant Certiorari for the following reasons:

THE APPELLATE COURT'S DECISION HAS CREATED A CIRCUMSTANCE WHEREBY HONEST AND UPSTANDING UNITED STATES CITIZENS HAVE BEEN CHEATED BY THEIR GOVERNMENT AND CLASSIFYING A STIPULATED TAX COURT DECISION AS AN "ADJUDICATED" AND "CONTESTED" CASE IS A CASE OF PLAIN ERROR THAT IGNORES REALITY AND COMMON SENSE.

Petitioners request the Court to grant Certiorari to clarify the status of a "stipulated" tax court decision and how it interfaces with 11 USC 505 (a) (2) (A).

In the Matter of Teal, 1 6 F3d 619 (5th Cir. 1994) is a view that the 9th Circuit decided to adopt in refusing to allow the petitioners to question the amount of their tax debt in a bankruptcy proceeding. The Teal court held that a stipulated judgment of the United States Tax Court was in fact one that was contested and adjudicated, and as such 11 USC 505 (a) (2) (A) prevented a bankruptcy court from making any

redetermination of the tax debt. Further, the Teal court assigned an aura of res judicata to the Tax Court decision.

When the 9th Circuit heard the petitioners' case, they asserted the concept of res judicata, relying upon Federated Dept. Stores Inc. v. Moitie , 452 US 394 (1981), which held the doctrine was a rule of fundamental and substantial justice, of public policy and private peace. In Federated, supra, the Supreme Court specifically rejected an attempt by the Ninth Circuit to apply equitable considerations to evaluating whether the concept of res judicata should be applied to individual cases. Justice Blackmun, joined by Justice Marshall, concurred in the result but noted that there are cases in which the doctrine of res judicata should give way to "overriding concerns of public policy and simple justice".

Petitioners believe that theirs is a case of "simple justice" and one wherein there is an "overriding concern of public policy". They were good honest citizens who worked hard and paid their taxes. They got caught up with a crook that the government allowed to operate. They were never warned by their government about this crook. When the government lost money as a direct result of the crook's activities, the government sought to recoup its losses on the

backs of the innocent petitioners. The government by its conduct added at least six years worth of interest to the burden borne by petitioners. Then to add insult to injury, the government makes a bargain with the petitioners and then weasels out on the bargain. If this isn't the type of case that Justice Blackmun was talking about there is no such case.

Petitioners suggest that the appropriate view of a stipulated judgments is that expressed by the Court in U.S. v. ITT Continental Baking Company , 420 US 160 (1974). That view essentially holds that for enforcement purposes one should construe a consent decree as a contract and use principles of construction just like any other contract. U.S. v. ITT Continental Baking Company, supra at 238. If the Court views the stipulated Tax Court decision in this manner, the solution is reasonable, simple and just. Is there a contract? If so, what are its terms. Have the parties lived up to the terms?

Applying that rationale to the case at hand, one would conclude that indeed there was a contract between the petitioners and the government. Further that the terms called for petitioners to get a 50% credit for funds invested with Berg, to have their "side issues" resolved, and to be given credit for tax preparation fees that were paid to Berg. The facts will clearly show that Petitioners only received one of

the agreed upon items, thus it is inequitable to hold them to the terms of the contract or if you will, the stipulated judgment.

This analysis was adopted by Judge McFeeley in In Re New Mexico Properties, Inc., 18 B.R. 936 (1982).

The key element of a stipulated decree that has been overlooked in the previous proceedings is that the Petitioners by waiving their right to litigate, which is guaranteed by the Due Process Clause, then the conditions upon which the waiver was given must be respected. This is the identical analysis made by Justice Stewart, joined by the Chief Justice, Justice Powell, and Justice Rhenquist, in a dissenting opinion to U.S. v. ITT Continental Baking Company , supra at 245.

When the Petitioners made their deal with the government, they were entitled to the full benefit of that deal. They didn't get it. Applying basic contract law to the problem, unless both contracting parties are bound, neither is bound. The government, by not living up to its end of the bargain with Petitioners has asserted that it was not bound by the deal. In that case it is fundamentally unfair to require Petitioners to abide by the deal they made with the government. It serves absolutely no useful purpose to prevent the Petitioners from explaining the facts and

circumstances of their deal with the government and to hold them to a figure that the government arrived at only by violating the express terms of the deal it had made with the Petitioners. This is absolutely nonsensical to give a tax court decision some kind of res judicata effect in this case. Further, it stretches credulity to say that this is a decision that was contested and adjudged. The tax court judge signed a judgment based upon a set of numbers placed in front of him by the government. He did not calculate Petitioners tax obligations, he performed an administrative function and signed his name, nothing more. To call this a judgment is to grant it a status far larger than it has. To use that status to perpetrate a fraud on American taxpayers is a disgrace. A court should dispense justice, not perpetuate injustices with hidebound rules.

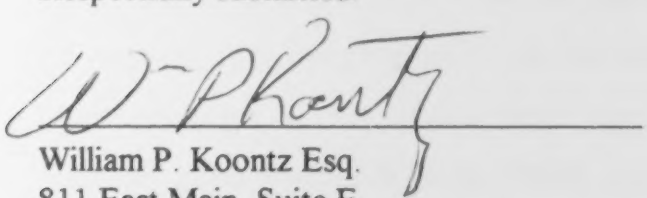
CONCLUSION

Is it Due Process of Law, when the government makes a deal with a citizen, does not live up to the deal, and then denies the citizen the right to have the Court examine the bargain? If that is what Due Process is then the American judicial system is a complete and utter failure.

By treating a US Tax Court stipulated judgment as a contested and adjudicated case, thereby denying the Petitioners the right to question the size of the government claim, in the face of clear and compelling evidence that the government has not lived up to the bargain it made with the Petitioner to get the Petitioners to forego their litigation rights, has resulted in an egregious violation of due process.

This Honorable Court should not stand idly by and allow government to snatch Petitioner's due process rights away by the rote application of a statute and a doctrine. For these reasons it is appropriate to issue a Writ of Certiorari to review the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted.



William P. Koontz Esq.
811 East Main, Suite E
Cottage Grove, OR 97424
Tel: (541) 942 2948 Fax: 942 5450
Counsel for Petitioners.

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In re: CLAYTON B. BAKER and
SALLY I. BAKER

Debtors,

Civil No. 94-6162-HO
93-60193

JUDGMENT

Bankruptcy Judge Higdon's November 30, 1993 order overruling debtors' objection to the IRS claim is affirmed. This appeal is dismissed.

Dated: July 20, 1994.

Donald M. Cinnamond, Clerk

by Lea Force, Deputy

JUDGMENT DOCUMENT NO:

APPENDIX B-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In re:	)	
	)	Civil No. 94-6162-HO
CLAYTON B. BAKER and	)	ORDER
SALLY I. BAKER,	)	
	)	
Debtors.	)	
	)	

This is a bankruptcy appeal challenging Bankruptcy Judge Higdon's November 30, 1993 order overruling the debtors' objection to the claim of the Internal Revenue Service (IRS). In late 1978 or early 1979, the debtors hired an attorney, Maxwell Berg, who specialized in tax planning. Mr. Berg developed a tax shelter investment plan which required his clients to invest in sham master recording limited partnerships. He then filed fraudulent returns for his clients, including the debtors, and obtained refunds for previous tax years. The IRS learned of the fraudulent activity and sent debtors a large tax deficiency bill for the years 1975-1980. Mr. Berg was indicted and fled the country. The debtors joined a large group of taxpayers who filed petitions in tax court. They were represented by attorneys Cole and Moore. The debtors alleged in their petition in tax court that they believed "that the assessment and collection of the claimed deficiencies for 1975, 1976, 1977, and 1978 are barred by the applicable statute of

limitations." (Appellee's Excerpts of Record, Exhibit F). The debtors and the IRS reached an agreement to resolve the dispute. One of the terms of the agreement was that the debtors would receive a credit for the refund checks which they claimed they never received, but rather were cashed by Mr. Berg. The United States Tax Court entered a decision requiring the debtors to pay certain deficiency amounts for the years 1977-1980 based on the parties agreement and stipulation. (Id., Exhibit G). The stipulation shows a zero tax liability for tax years 1975 and 1976. The debtors argue that they believed this zero tax liability for 1975 and 1976 meant that the statute of limitations applied to those years, and that, in effect, their "credit" should have applied to subsequent years.

DISCUSSION

The issue is whether the United States Bankruptcy Court has the authority to set aside the stipulated Tax Court decision under Fed. R. Civ. P. 60(b)(6), in contravention to 11 U.S.C. & 505(a)(2)(A). (Debtors' Brief). Fed. R. Civ. P. 60(b)(6) provides, in relevant part:

> (b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment.

This is an extraordinary procedure that permits the court which rendered the judgment to grant relief upon a showing of good cause and upon terms that are just. Brown v. McCormick, 608 F.2d 410, 413 (10th Cir. 1979); Oliver v. Monsanto Co., 56 F.R.D. 370, 372

(S.D. Tex. 1972), aff'd 487 F.2d 514 (5th Cir. 1973). This rule should not be applied where a party seeking reconsideration has ignored normal legal recourse. United States v. Alpine Land and Reservoir Co., 984 F.2d 1047, 1049 (9th Cir. 1993). The moving party must show that (1) there has been injury, and (2) that circumstances beyond the control of the moving party prevented timely action to protect their interest. United States v. Alpine Land and Reservoir Co., 984 F.2d 1047 (9th Cir. 1993). This rule is not intended to enable litigants to avoid the consequences of a decision to settle which appears unfortunate in retrospect. Smith v. Widman Trucking & Excavating, 627 F.2d 792, 793 (7th Cir. 1980).

11 U.S.C. &505(a)(2)(A) provides that a bankruptcy court may not determine "the amount or legality of a tax, fine, 5 penalty, or addition to tax if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction. . . ." If a claim of liability or non-liability relating to a particular tax year is litigated in Tax Court, a judgment on the merits is res judicata as to any subsequent proceeding involving the same claim and the same tax year. Russell v. U.S., 592 F.2d 1069, 1072 (9th Cir. 1979) cert. den., 444 U.S. 946 (1979). The parties and their privies are bound not only to matters offered to sustain or defeat a claim, but as to any other admissible matter which might have been argued. Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591 (1948) (judgment ends case which cannot be brought into litigation upon any ground whatever); see also Russell v. U.S., 592 F.2d at 1072 (Tax

Court acquires jurisdiction to decide the entire gamut of possible issues that controlled determination of tax liability). A stipulated decision by the Tax Court is a final judgment on the merits. Matter of Donahue, 107 B.R. 146, 151 (Bkrtcy. S.D. Ohio 1989); U.S. v. Wynshaw, 516 F.Supp. 785, 788 (S.D.N.Y. 1981).

The debtors argue that in order for section 505(a)(2)(A) to have prescriptive effect, there must be evidence that the debtors' claim of statute of limitations was adjudicated, and there is no such evidence. They argue that the IRS improperly applied credits to tax years 1975 and 1976 without informing them or obtaining Tax Court authorization and led them to believe they would receive credits against the ultimate amount of tax liability determined by the Tax Court in its decision. They argue that the IRS should be estopped from seeking the full amount in the Tax Court decision plus interest and that they are not seeking to relitigate taxes, rather only to clarify their agreement. The IRS argues, in effect, that the statute of limitations was not to apply to tax years 1975 and 1976, or any other years at issue, and that they properly applied the correct credit to the earliest years in accordance with the parties'
agreement.

An IRS attorney negotiated a settlement with debtors' attorneys Moore and Cole in the Tax Court action. (Appellee's Excerpts of Record, Exhibit E). That settlement was reflected in a document titled "COUNSEL SETTLEMENT MEMORANDUM In re: Clayton and Sally Baker v. Commissioner" dated April 1, 1991. Id. This "Memorandum" is signed by the IRS attorney and an IRS paralegal,

and not by debtors. Debtors claim they never saw this document and never agreed to its terms. This settlement memorandum indicates that debtors were to receive 50% of their cash investment in the master recording partnership as a credit against their deficiency, that this cash investment totalled $30,000 and that debtors would receive $15,000 as credit "in settlement of this case." Id. The settlement memorandum specifies that this credit is to apply first against the 1975 deficiency of $4,402.00 leaving a zero deficiency, then against the 1976 deficiency of $5,623.00 leaving a zero deficiency, and then against the 1977 deficiency of $5,813.00 leaving an $838.00 deficiency. The record does include a copy of a March 19, 1991 letter from attorney Moore to the debtors which states, in relevant part:

> Now that the Tax Court's opinion [in one of the test cases] has been issued, the Internal Revenue Service wants to finish up the paperwork for those of our clients who have not formally accepted the prior settlement offer. . . .
>
> Enclosed please find three original versions of your final settlement documents as prepared by the Internal Revenue Service. All three copies should be signed where indicated and returned to this office for filing with the Tax Court. . . .
>
> The settlement documents reflect a reduction in the gross amount of taxes claimed by the IRS equal to half of the size of your projected "investment" with Mr. Berg funded by actual federal refund checks endorsed by him or his office. No amounts actually returned to you by Mr. Berg have been included in the calculation of the reduction in taxes claimed. This reduction was applied to the oldest years first, until exhausted. . . .
>
> If you choose not to accept the settlement with the IRS, your

> case will have to proceed to trial. In light of [the decision in the recent test cases], the chances of success are negligible. Certainly, the IRS will not agree at this time to any improvement in their offer, considering what they won from all the other taxpayers at trial. . . .
> (Appellee's Excerpts of Record, Exhibit H).

Debtors do not dispute that they did receive this letter from their attorney. The letter explains that the settlement included application of credits to the oldest years first, which were 1975, 1976, and 1977. They do not dispute that they knew the total amount of the deficiencies claimed by the IRS for years 1975-1977, i.e., $4,402, $5,623, $5,813, respectively. (See Appellee's Excerpts of Record, Exhibit F. notice of deficiency letter from IRS to debtors, statutory notice to debtors). Debtors argue that their investment in the master recording partnership was more than $30,000 and that they were, therefore, entitled to more than $15,000 in credit. They do not argue that they questioned the total credit amount prior to signing the stipulated Tax Court decision. The stipulated Tax Court decision reflects the credit calculation in the April 1, 1991 settlement memorandum.

The bankruptcy court is not authorized to set aside the stipulated Tax Court decision under Fed. R. Civ. P. 60(b)(6), because it is not the court which rendered the decision. There is no evidence the debtors sought relief from the judgment from the Tax Court. Even if Fed. R. Civ. P. 60(b)(6) did apply, the debtors have not demonstrated good cause for failing to clarify any questions they had about the statute of limitations or credit amounts at the time they agreed to settle.

Debtors are, in effect, requesting that the bankruptcy court reevaluate the amount of taxes owed by debtors, in contravention of 11 U.S.C. & 505(a)(2)(A). The fact that the Tax Court entered a final judgment on debtors' tax liability for the years 1975-1980 means that the debtors are now barred from challenging that liability based on res judicata. In addition, by signing the stipulated Tax Court decision, debtors also agreed that the "entry of this Decision is with prejudice to any claims (past, present, or future) by petitioners to seek any further relief against the United States government in any forum with respect to either the Berg/Berg and Allen Transactions or this Decision. . . " (Id., Exhibit G).

CONCLUSION

Bankruptcy Judge Higdon's November 30, 1993 order overruling debtors' objection to the IRS claim is affirmed. This appeal is dismissed.

DATED this 19th day of July, 1994.

/ss/ MICHAEL R. HOGAN
UNITED STATES DISTRICT JUDGE

APPENDIX C - 1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE CLAYTON BAKER; SALLY I. BAKER, *Debtors.* CLAYTON BAKER; SALLY I. BAKER, *Petitioners-Appellants,* v. INTERNAL REVENUE SERVICE, *Respondent-Appellee.*	No. 94-35803 D.C. No. CV-94-06161-MRH OPINION

Appeal from the United States District Court
for the District of Oregon
Michael R. Hogan, District Judge, Presiding

Argued and Submitted
November 15, 1995—Portland, Oregon

Filed January 12, 1996

Before: James R. Browning, Pamela Ann Rymer, and
Thomas G. Nelson, Circuit Judges.

Per Curiam

SUMMARY

Bankruptcy/Tax/Litigation and Procedure (Civil)

The court of appeals affirmed a district court judgment. The court held that a bankruptcy court could not redetermine debt-

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ors' tax liability as established by a stipulated Tax Court decision.

Appellants Clayton and Sally Baker invested in tax shelters promoted by Maxwell Berg and the law firm of Berg & Allen. The Internal Revenue Service (IRS) eventually disallowed the tax shelters as shams. The IRS issued notices of deficiency to investors.

The Bakers petitioned the Tax Court for review of the IRS decision. The Tax Court tried "test cases" and upheld the notices of deficiency and refused to allow the investors a credit based on refunds Berg allegedly pocketed.

The IRS made a settlement offer to some of the Tax Court petitioners, including the Bakers. Under the offer's terms, the taxpayers would get "credits" equal to one-half of the amount they invested with Berg. Settlement papers, in the form of a stipulated Tax Court judgment reflecting the application of the credit, were forwarded to the Bakers by their lawyer. An explanation written by the lawyer accompanied the stipulation. However, neither the letter nor accompanying stipulation provided the Bakers with a dollar figure representing their total liability for taxes and accrued interest as of the settlement date. The Bakers signed the stipulation without discussing it with their lawyer.

The Tax Court entered the stipulated decision, and neither party appealed. The Bakers received a tax bill for approximately $175,000, most of which was interest.

The Bakers filed a joint voluntary bankruptcy petition. The IRS filed a proof of claim, and the Bakers objected to it. The bankruptcy court overruled the objection and held that it lacked jurisdiction to readjudicate the Bakers' tax liability. The district court affirmed. The Bakers appealed, contending that the bankruptcy court erred in refusing to readjudicate their tax liability.

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[1] Title 11 U.S.C. § 505(a)(2)(A) bars bankruptcy courts from determining the "amount or legality of a tax" if that amount or legality was "contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction" before commencement of the bankruptcy proceeding.

[2] On its face, the Tax Court judgment established the amount of tax owed. The Fifth Circuit was correct in concluding that an assessment of the amount owed "presupposes the legality" of the assessment. The Tax Court "adjudicated" the Bakers' tax liability when it entered a judgment against them. A case that is not tried on the merits can still be "adjudicated" within the meaning of § 505(a)(2)(A). The Bakers' tax liability was contested before and adjudicated by a court of competent jurisdiction, and thus § 505(a)(2)(A) applied.

[3] Res judicata also barred the bankruptcy court from revisiting the Tax Court's decision. The Bakers' liability for the years in question was litigated before the Tax Court, and the Tax Court issued its final judgment before bankruptcy court proceedings began. The bankruptcy court proceeding involved the same parties, and the issue the Bakers sought to raise had been litigated before the Tax Court.

COUNSEL

William P. Koontz, Cottage Grove, Oregon, for the petitioners-appellants.

Roger E. Cole, United States Department of Justice, Tax Division, Washington, D.C., for the respondent-appellee.

OPINION

PER CURIAM:

Appellants Clayton and Sally Baker appeal from the rejection of their attempt to overturn a stipulated judgment entered

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against them by the United States Tax Court. We have jurisdiction pursuant to 28 U.S.C. §§ 158(d) and 1291, and affirm.

I.

The Bakers' tax problems began in late 1978 or early 1979, when they invested $30,000 in tax shelters promoted by Maxwell Berg and the Los Angeles law firm of Berg & Allen. Details about the tax shelters, which the IRS eventually disallowed as shams, are sketchy.[1] Both parties agree, however, that Berg filed amended returns on behalf of the Bakers, using the shelters to claim deductions and credits for the tax years 1975 through 1980. The resulting refund checks were sent directly to Berg, who negotiated them and, according to the Bakers, kept the money for himself. The Bakers deny authorizing Berg to file the amended returns, or receiving any proceeds of the refund checks. They claim to have discovered Berg's fraudulent activities only in 1981 or 1982, when the IRS issued notices of deficiency to investors in the Berg & Allen tax shelters.

The Bakers petitioned the Tax Court for review of the IRS decision in May 1983, arguing that the statute of limitations barred the IRS from assessing additional taxes for the tax years 1975 through 1978. Proceedings before the Tax Court moved slowly. The Bakers' petition was one of more than 300 filed in response to the notices of deficiency, and the litigants lacked access to Berg & Allen's records, which had been seized in connection with a grand jury investigation in 1981, and to Berg himself, who had fled the country.

In 1988, five years after the Bakers filed their Tax Court petition, the Tax Court litigants finally obtained limited

[1]Some of the events surrounding the Berg & Allen tax shelters are discussed in a related Tax Court case. *See Abeson v. Commissioner*, 59 T.C.M. (CCH) 391 (1990), *aff'd sub nom. Rivera v. Commissioner*, 959 F.2d 241 (9th Cir. 1992) (table).

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access to the documents seized by the grand jury. Two years later, the Tax Court tried six "test cases," upholding the notices of deficiency and refusing to allow the investors a credit based on the refunds Berg had allegedly pocketed. *See Abeson v. Commissioner*, 59 T.C.M. (CCH) 391 (1990), *aff'd sub nom. Rivera v. Commissioner*, 959 F.2d 241 (9th Cir. 1992) (table).

After the test cases were decided, the IRS made a settlement offer to some of the Tax Court petitioners, including the Bakers. Under the terms of the offer, the taxpayers would get "credits" equal to half of the amount they had invested with Berg; in the Bakers' case the IRS calculated the credit at $15,000. This credit would be applied to the taxpayer's deficiency, beginning with the oldest years, until it was exhausted.[2] Settlement papers, in the form of a stipulated Tax Court judgment reflecting the application of the credit, were forwarded to the Bakers by their lawyer in March 1991.[3]

---

[2]An internal IRS memorandum, which was not provided to the Bakers or their lawyer at the time of settlement, indicates the IRS did not consider the Bakers' statute of limitations defense when it calculated and applied their credit. According to the memorandum, the credit was applied as follows:

Year	*Deficiency*	*Credit applied*	*Credit carryover*
1975	$4,402.00	$4,402.00	$10,598.00
1976	$5,623.00	$5,623.00	$ 4,975.00
1977	$5,813.00	$4,975.00	zero

[3]The stipulation set out the Bakers' remaining liability for income tax and additions to tax as follows:

Year	*Income tax*	*Additions to tax, I.R.C. § 6651(a)*
1975	none	none
1976	none	none
1977	$ 838.00	none
1978	$15,695.00	$ 835.00
1979	$14,905.17	$ 629.55
1980	$25,207.61	$1,108.00

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Accompanying the stipulation was a letter, written by the Bakers' lawyer, which contained the following explanation:

> The settlement documents reflect a reduction in the gross amount of taxes claimed by the IRS equal to half of the size of your projected "investment" with Mr. Berg . . . . This reduction was applied to the oldest years first, until exhausted.
>
> Once the documents are filed with the Court, it can be expected that a bill for all the unpaid taxes plus accrued interest will be generated by the Internal Revenue Service within about three to four months. There is no requirement that the bills be paid immediately, but interest will continue to accrue until they are paid. . . .

Neither the letter nor the accompanying stipulation provided the Bakers with a dollar figure representing their total liability for taxes and accrued interest as of the settlement date.[4]

The Bakers did not discuss the stipulation with their lawyer before they signed it on March 22, 1991. They claim that because the stipulation showed no taxes due for 1975 and 1976, they assumed the Tax Court had accepted their statute of limitations defense for those years. Despite their lawyer's explanation that the stipulation reflected the credit offered by the IRS, the Bakers believed the credit would be applied later, further reducing their liability. And despite the letter's warning that interest would "continue to accrue," they assumed interest would accrue only from the date of the stipulation forward. As a result of these assumptions, the Bakers expected

[4]The stipulation reflected tax deficiencies of $56,645.78 and additions to tax of $2,572.55; the only reference to interest was a statement that by signing the stipulation, the Bakers waived "the restrictions . . . prohibiting assessment and collection of any deficiency in tax . . . plus statutory interest, until the decision of the Tax Court has become final."

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that signing the stipulation would allow them to resolve their tax problems for approximately $45,000.

The Tax Court entered the stipulated decision on April 10, 1991, and neither party appealed. In 1993, the Bakers received a tax bill for approximately $175,000, most of it interest that had been accruing since the late 1970s. The Bakers did not return to Tax Court. Instead, they filed a joint voluntary petition under Chapter 13 of the Bankruptcy Code. The IRS filed a proof of claim for $174,182.63 to which the Bakers objected. The Bankruptcy Court overruled the objection, holding that it lacked jurisdiction to readjudicate the Bakers' tax liability. On appeal, the district court affirmed. This appeal followed.

II.

The Bakers contend the Bankruptcy Court erred in refusing to readjudicate their tax liability. We disagree.

A.

[1] Ordinarily a bankruptcy court can determine the amount and validity of a debtor's taxes, 11 U.S.C. § 505(a)(1), but this power is limited by 11 U.S.C. § 505(a)(2)(A), which bars bankruptcy courts from determining "the amount or legality of a tax . . . if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction" before commencement of the bankruptcy proceeding.

The Bakers argue § 505(a)(2)(A) does not apply to their case because the "amount or legality" of their tax was not "contested" and "adjudicated" in the Tax Court within the meaning of the statute.[5] Neither argument is persuasive.

[5]It is undisputed that the Tax Court is a court of competent jurisdiction and that proceedings in the Tax Court ended before the Bakers filed for bankruptcy.

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[2] On its face, the Tax Court judgment establishes the *amount* of tax owed, and we agree with the Fifth Circuit's conclusion that an assessment of the amount owed "presupposes the legality of that assessment." *IRS v. Teal (Matter of Teal)*, 16 F.3d 619, 621 (5th Cir. 1994). Nor are we persuaded by the Bakers' contention that the claims were not "contested" and "adjudicated" within the meaning of the statute. According to § 505(a)(2)'s legislative history, a proceeding is contested if, prior to the bankruptcy filing, the debtor had filed a petition in the Tax Court and the IRS had filed an answer. *See* 124 Cong. Rec. 32250, 32413 (Sept. 28, 1978) (statement of Rep. Edwards).[6] This definition has been adopted by the few courts that have considered the issue, and we see no reason to depart from it. *See Matter of Teal*, 16 F.3d at 621 n.4; *Richcreek v. IRS*, 1988 WL 81527, at *3 (S.D. Ind., Mar. 22, 1988). The Tax Court "adjudicated" the Bakers' tax liability when it entered judgment against them. A matter is adjudicated "when a 'judgment of a court of competent jurisdiction' has been decreed." *Matter of Teal*, 16 F.3d at 621 (quoting Black's Law Dictionary 42 (6th ed. 1990)). The Bakers argue a stipulated judgment is not an adjudication because it is not a decision "reached based upon evidence presented to the court." We decline to adopt this view. If the statute were read as the Bakers suggest, the IRS would be forced to fully litigate all Tax Court cases to foreclose petitioners from relitigating their tax liability in bankruptcy court. Section 505(a)(2)(A)'s legislative history makes it clear that no such result is required. A case not tried on the merits can nonetheless be "adjudicated" within the meaning of the statute. *See* 124 Cong. Rec. 32250, 32413 (Sept. 28, 1978) (statement of Rep. Edwards) (provided a petition and answer were filed in Tax Court, a subsequent default judgment bars bankruptcy courts from relitigating the debtor's tax liability).

[6]The statement of Rep. Edwards, the House sponsor of the Bankruptcy Reform Act of 1978, was issued in lieu of a conference committee report and constitutes persuasive evidence of Congress's intent. *Begier v. IRS*, 496 U.S. 53, 64 n.5 (1990).

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Because the Bakers' tax liability was contested before and adjudicated by a court of competent jurisdiction, § 505(a)(2)(A) applies.

We also reject the Bakers' argument that, even if § 505(a)(2)(A) applies, the statute should not preclude a court from granting equitable relief under Fed. R. Civ. P. 60(b).[7] Section 505(a)(2)(A) is a jurisdictional statute that deprives bankruptcy courts of authority to decide a category of claims. *Matter of Teal*, 16 F.3d at 622. By enacting a statute that is jurisdictional in nature, "Congress did not leave bankruptcy courts the discretion to disregard tax court adjudications and concomitantly seize jurisdiction out of equitable concerns." *Id.* Although the Bakers' situation is unfortunate, they may not use Rule 60(b) to override the Bankruptcy Court's jurisdictional limitations.

B.

The lower courts' holdings are also supported by the doctrine of res judicata.[8] Under this doctrine, a final judgment on the merits of an action precludes the parties from relitigating issues that were or could have been raised in that action. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). In the tax context, once a taxpayer's liability for a particular year is litigated, "a judgment on the merits is res judicata as to any subsequent proceeding involving the same

[7]Although the Bakers never filed a Rule 60(b) motion, they objected to the IRS proof of claim on the ground that they were entitled to relief under Rule 60(b). Neither the Bankruptcy Court nor the District Court addressed the availability of relief under Rule 60(b), and because of our jurisdictional holding, we decline to do so as well.

[8]We agree with the Fifth Circuit's statement that res judicata is "closely related, if not identical" to issues regarding the Bankruptcy Court's authority under Section 505. *See Matter of Teal*, 16 F.3d at 621 n.3. Section 505(a)(2)(A) "expresses in jurisdictional terms the traditional principles of res judicata or claim preclusion." *Doerge v. United States (In re Doerge)*, 181 B.R. 358, 364 (Bankr. S.D. Ill. 1995).

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claim and the same tax year." *Commissioner v. Sunnen*, 333 U.S. 591, 598 (1948). For res judicata purposes, an agreed or stipulated judgment is a judgment on the merits. *See United States v. International Bldg. Co.*, 345 U.S. 502, 505-06, *reh'g denied*, 345 U.S. 978 (1953); *Lawrence v. Steinford Holding B.V. (In re Dominelli)*, 820 F.2d 313, 316-17 (9th Cir. 1987).

[3] The Bakers' liability for the years in question was litigated before the Tax Court, and the Tax Court issued its final judgment before the Bankruptcy Court proceedings began. *See* I.R.C. §§ 7483, 7481(a). The Bankruptcy Court proceeding involved the same parties, and the issue the Bakers sought to raise—their statute of limitations defense—had been litigated before the Tax Court. Res judicata barred the Bankruptcy Court from revisiting the Tax Court's decision.

III.

Because its jurisdiction was limited by 11 U.S.C. § 505(a)(2)(A) and the doctrine of res judicata, the Bankruptcy Court could not redetermine the Bakers' tax liability as established by the stipulated Tax Court decision.

AFFIRMED.

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APPENDIX D-1

UNITED STATES TAX COURT

CLAYTON B. BAKER and SALLY I. BAKER,	)	
Petitioners,	)	Docket No. 11956-83
v.	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent.	)	

DECISION

Pursuant to the agreement of the parties in this case, it is

ORDERED AND DECIDED: That there are deficiencies in income taxes and additions to the tax due from the petitioner(s) as follows:

Taxable Year	Income Tax	Additions To the Tax I.R.C. & 6651(a)
1975	None	-
1976	None	-
1977	$ 838.00	-
1978	15,695.00	$ 835.00
1979	14, 905.17	$ 629.55
1980	25, 207.61	$ 1,108.00

(Signed) Arthur L.Nims, III
Judge.

Entered: APR 10 1991

* * * * *

It is hereby stipulated that the Court may enter the foregoing decision in this case.

{Government Exhibit D }

It is further stipulated that, effective upon the entry of this decision by the Court, petitioner(s) waive(s) the restrictions contained in I.R.C. & 6213 (a) prohibiting assessment and collection of any deficiency in tax shown above in this decision, plus statutory interest, until the decision of the Tax Court has become final.

It is further stipulated that petitioner(s) release any and all claims against the United States Government, including any claims for replacement check(s) filed with the Financial Management Service (or Division of Check Claims) of the Department of the Treasury, arising out of the Berg/Berg & Allen Transactions; and that the entry of this Decision is with prejudice to any claims (past, present, or future) by petitioners to seek any further relief against the United States Government in any forum with respect to either the Berg/Berg and Allen Transactions or this Decision; this release is without prejudice with regard to any rights petitioner(s) may have to pursue claims against any non-governmental entities and/or persons including Crocker Band, now known as Wells Fargo Bank, Family Savings & Loan Association, and the Client Security Fund of the California State Bar. "Berg/Berg & Allen Transactions" includes any and all transactions connected with Charles Maxwell Berg and/or the law firm of Berg & Allen or any of its employees ("Berg & Allen") including but not limited to transactions involving tax return preparation, any partnership investments by petitioner(s), any refunds or refund checks, any services performed by Berg & Allen, or any theft of money by Berg & Allen.

/ss/
CLAYTON B. BAKER
Petitioner
2650 Foots Creek Road
Gold Hill, Oregon 97525

Date: 3/22/91

/ss/
SALLY I. BAKER
Petitioner
Same address above

/ss/
Joseph F. Moore
Counsel for Petitioners
540 South Marengo Avenue
Pasadena, CA 91101
Tel. No. (213) 681-0174

Date: 3-26-91

ABRAHAM N.M. SHASHY, JR.
Chief Counsel
Internal Revenue Service

By: /ss/
JOHN O. KENT
SPECIAL TRIAL ATTORNEY
Tax Court No. KL0008
Main Post Office
P.O. Box 2031
Los Angeles, CA 90053
Tel. No. (213) 894-4660

Date: 4/1/91

APPENDIX E-1

UNITED STATES TAX COURT

In the Matter of:	)	Docket Numbers:
HAROLD GILES and DONNA	)	15854-82
GILES, ET AL,	)	16018-82
	)	16035-82
Petitioners,	)	28089-82
vs.	)	28090-82
	)	28094-82
COMMISSIONER OF	)	6426-83
INTERNAL REVENUE	)	6965-83
	)	9037-83
Respondent.	)	

Wednesday,
June 15, 1988

Courtroom B
Federal Building, 8th Floor
11000 Wilshire Boulevard
Los Angeles, California

The above-entitled matter came on for recall, pursuant to notice, at 11:40 a.m.

BEFORE: HONORABLE PETER J. PANUTHOS
Special Trial Judge

APPEARANCES:

On behalf of Petitioners:
JONATHAN B. COLE, ESQ.
Nemecek & Cole
920 American Savings Plaza
15260 Ventura Blvd.
Sherman Oaks, CA 91403-5399
(818) 788-9500
and
JOSEPH F. MOORE, ESQ.
Bigelow, MooRe & Tyre
One W. California Blvd. Suite 321
Pasadena, CA 91105
(213) 681-0174

On behalf of Respondent:
ROSS PAULSON, ESQ.
MONICA MELGAREJO, ESQ.
JOHN KENT, ESQ.
Office of District Counsel
Internal Revenue Service
300 N. Los Angeles Street 19
Room 3018
Los Angeles, CA 90012
(213) 894-4672

Video/Audio Recording Services, Inc.
1300 T Street
Sacramento, CA 95814
(916) 448-2457

PROCEEDINGS

THE CLERK: Docket Number 15854-82, Harold Giles and Donna Giles, related dockets and related Petitioners.

Parties state their appearances, please.

MR. COLE: Good morning, Your Honor, Jonathan Cole, Nemecek and Cole, for the Giles Petitioner, and all related Petitions under those docket numbers.

MR. MOORE: Joseph Moore for Mr. Gibes in that case, and all related cases under that docket number.

MR. PAULSON: Ross Paulson, Monica Melgarejo and John Kent for Respondent. Good morning, Your Honor.

THE COURT: Good morning. The record should reflect that the Parties in these dockets, the parties who are represented by Messrs. Cole and Moore, had a conference in chambers this morning and it's the Court's understanding that the parties have something they would like to report to the Court with respect to settlement of these dockets, is that correct?

MR. PAULSON: Yes, Your Honor.

MR. COLE: Yes, Your Honor.

THE COURT: Okay. Why don't you go ahead and do that.

MR. PAULSON: Your Honor, the parties have agreed on a method of settling the cases wherein the Petitioners are represented by Attorneys Mr. Cole and Mr. Moore. If it please the Court, I'd like to read into the record, the terms of the settlement, the basic terms. We expect to be able to file with the Court a written document which specifies the terms of the settlement in the coming week.

First of all, the parties have agreed that the Petitioners are to be allowed a credit equal to 50 percent of the cash investment per the red book. This credit would be considered to be a nonrefundable credit, such that no overpayments would ever result on any of the years pending before the Court.

The method of application of the credit would be to apply the credit allowed to the earliest taxable year before the Court. The idea with respect to this is that the credits would be applied against carryback years; carryback years and the year of the investment.

The second major topic would be the tax return preparation fees. The taxpayers are to be allowed as a deduction, the amounts of the tax return preparation fees shown by Berg's records. The proof necessary to prove the tax preparation fees would be the bills contained in the tax return preparation files; the tax client routing forms. Secondary evidence would include the transaction report and the daily deposit and related disbursements documents. To the extent that tax preparation fees have been claimed and allowed, there will be no dispute between the parties. To the extent that tax return preparation fees have been claimed and disallowed or not claimed, the parties agree that these tax return preparation fees, to the extent proven, are properly allowable in the appropriate year pending before the Court.

So, for example, if there was a 1980 tax return preparation, or return prepared for 1980, and it was prepared in 1981, the proper year for the deduction of the tax return preparation fee would be 1981. If 1981 was not before the Court, the settlement would not encompass

that year. That year would be -- we would assume that the taxpayer had already claimed and that it had already been allowed with respect to the 1981 year.

If there was a 1979 return prepared and a deduction was claimed in the 1980 return, but disallowed, and we have proven that there is a deduction allowable for that tax return preparation fee, we would allow the taxpayers that tax return preparation fee in 1980. That would be a year before the Court.

The third major topic concerns a theft loss. In the event that there is an amount shown to be a theft loss, taxpayers would have the burden of proving from the daily deposit and related disbursements sheets and the transaction report ledger, and the bank statements or canceled checks, to show that some amount was taken by Mr. Berg.

I would ask that Mr. Cole state whether or not this is correct, from his perspective.

MR. COLE: Yes, our understanding of that, and I think I can clarify it simply, is after you determine that there is a certain amount of money in a taxpayer's account, through the Berg records that have been identified by Mr. Paulson, and after deducting out the investment, the tax prep fees, whatever, maybe interest on the investment if it was charged, and any other fees that might be a deduction; if there is an amount reflected as due to the taxpayer on the records, but we establish that the amount was not remitted to the taxpayer, in other words, that the check was never cashed; maybe it was written and not picked up; that the check, the amount is due but the check was never written, then

that amount, which is reflected in the records, which is due the taxpayer, but we established the taxpayer didn't receive, in the manner I've just described, would then be a theft loss.

Do you agree with that?

MR. PAULSON: That's correct. Yes, and that would be allowable in the last year pending before the Court

Mr. Moore?

MR. MOORE: Mr. Paulson mentioned that the credit with respect to the investment, is a nonrefundable credit and that no overpayments would be generated by reason thereof. I think also we have understanding that if there is a "frozen refund", that in that instance an overpayment for a given year, perhaps, could be created with the expectation that that "frozen refund" overpayment would be applied through the Service Center to appropriate years in issue.

MR. PAULSON: That's correct. I would address that just briefly since you brought up the question of any frozen refunds, the parties have agreed that with respect to a frozen refund year, the decision documents will show that there is a deficiency in tax of the appropriate amount; for example, if the notice of deficiency shows a $75,000 deficiency, the decision document to be filed with the Court will show that there is a deficiency in income tax of $75,000. Now, if, with respect to that $75,000 -- with respect to that taxable year, if there was a frozen refund check, frozen in the amount of $77,000 for that year, then that amount would not be included in the decision document; but what would happen would be after the Service assesses a $75,000 deficiency, the Service would apply a $77,000 credit shown on the

taxpayer's account, against that deficiency in the amount of $75,000, we'll say, and there will be a $2,000 amount left over as a credit which would then be applied against any other tax liability of the taxpayer. If there were no other tax liabilities, then as an administrative matter, the Service would be refunding to the taxpayer any excess.

THE COURT: And, you concur with that statement?

MR. MOORE: Absolutely, Your Honor, that's exactly riqht.

MR. COLE: We concur exactly.

THE COURT: Does that conclude the terms of the settlement?

MR. MOORE: No, Your Honor.

MR. PAULSON: Your Honor, there are a few more terms. The fourth major term of the settlement is that all claims against the United States Government, including any claims pending with the FMS, the Financial Management Service, arising out of the Berg or Berg and Allen transactions, are released. This release is without prejudice with regard to any rights taxpayers may have to pursue claims against any nongovernmental entities and/or persons, including Crocker Bank, now known as Wells Fargo Bank; and Family Savings and Loan Association; and the Client Security Fund of the California State Bar.

The fifth major point of the settlement is that Mr. Cole has agreed to drop his objection to the stipulation filed with the United States District Court, by Respondent and the Assistant U. S. Attorney, Steven Zipperstein, and to indicate to the U. S. District Court that he has no objection to that stipulation. In other words, Mr. Cole has filed

an objection. The objection will be withdrawn and Mr. Cole will indicate that there is no objection to that stipulation.

THE COURT: And that refers to the matter concerning the relief of grand jury material, is that correct?

MR. PAULSON: Yes, Your Honor.

MR. COLE: Yes, I'll just file a withdrawal of the objection, a statement of nonopposition to the Stipulation entered into between the United States Attorney's Office and the Internal Revenue Service, which will authorize the release of the Grand Jury material to the Service.

MR. PAULSON: The sixth major point of this is that on all decision documents, the name and the correct address of the taxpayer, and Counsel's signatures will be put on all decision documents, that are on every single decision document, you will find a taxpayer's name, along with their signatures and their correct residence; no post office boxes or "care of" addresses will be acceptable. Taxpayer's addresses, their real addresses, will be indicated on all decision documents and Counsel's signature and addresses will also appear on all decision documents.

The seventh point is that with respect to any side issues; that is, non-Berg transactions, transactions for which taxpayers wish to submit additional information to the Service, the parties have agreed -- the parties have agreed privately on a method of resolving those side issues.

The parties expect to be able to report to the Court the progress the parties have made on those side issues in the coming weeks. With

respect to the docketed cases, the parties hope to be able to report to the Court at the earliest practicable moment as to the resolution of any possible side issues.

THE COURT: Fine.

MR. PAULSON: The eighth major point of this is that the parties have agreed on some time limits or targets, if you will, for getting the cases resolved, getting the cases resolved where Mr. Cole and Mr. Moore represent Petitioners before the Court.

The first topic would be the docketed cases. With respect to the docketed cases, the parties intend to file decision documents with the Court no later than July 30th, 1988.

THE COURT: When you say docketed cases, do you mean the cases that are the test cases?

MR. PAULSON: Yes.

THE COURT: Okay.

MR. PAULSON: With respect to the test cases, the nine test cases, parties --

THE COURT: And you want to file decision documents by when?

MR. PAULSON: No later than July 30th, 1988.

The parties would expect to have all side issues resolved with certainty, on those nine cases by July 15th, 1988. It is our understanding that there are only two cases that have any side issue problems; that seven of the cases have no side issue problems; so that means the two cases that do have side issues, we expect to have them resolved by July 15th, 1988.

With respect to the balance of Mr. Cole's and Mr. Moore's cases, we expect to be able to report to the Court by, on or about July 15, 1988, as to the status of those cases; that is, whether or not the taxpayers in those cases agree to the proposed settlement. The petitioners have agreed to furnish Respondent with a commitment, yes or no, with respect to the remaining cases of which there are some 36, by July 15th, 1988.

Decision documents with respect to those cases, the balance of the Cole and Moore cases, would be due with the Court by September 30th, 1988. If there are times -- if any problems do arise with respect to the submission of either the commitments or the decision documents, or resolution of the side issues, the parties intend to be able to report to the Court as to the situation on those potential problems.

And, Your Honor, I believe that concludes the agreement; the basic agreement.

THE COURT: Mr. Cole and Mr. Moore?

MR. MOORE: Yes, Your Honor, the only thing I -- two things I would say, for the benefit of our clients here in the room is that so-called FMS, or Financial Management Services, used to be known as the Division of Check Claims, so that they understand who it is we're waiving it with.

Secondly, on the method of reporting, would that be telephonically or writing, or is there a preferred way to handle that?

THE COURT: The Court would be perfectly fine with a conference call. Frankly, I'd much rather have the parties spending their energy towards getting the documents together than time preparing a

status report to tell me what hasn't gotten done. So, I think a conference call on those dates would be perfectly fine.

MR. MOORE: That would be delightful. That would be great

MR. PAULSON: Your Honor, Respondent fully concurs that a conference call would be the best way of handling this.

MR. COLE: Your Honor, I believe Mr. Paulson has accurately set forth what is the negotiated agreement and I have, as stated previously, seven of nine test cases committed; two more I anticipate the commitments on Monday, and the other time deadlines are deadlines we've agreed to and we believe we can live with them.

THE COURT: As we discussed in chambers, what the Court will do is recall these cases on Tuesday morning of next week for the purpose of receipt of a written stipulation of settlement. Hopefully, you will have been able to come to the exact terms. I think you've been pretty clear and pretty definite. It seems to me there's no reason why you can't put this into specific writing and file it with the Court next Tuesday. We'll also utilize that as an opportunity for a status report on these cases so you can advise the Court as to where you stand with having gotten together the numbers with respect to the test cases, the Cole and Moore test cases. So, we'll recall this at 10:00 o'clock next Tuesday.

The Court is obviously delighted with the parties having arrived at a settlement in these dockets. I think that the basis of settlement sounds to the Court like an absolutely sound and solid means of resolving an incredibly difficult problem. So, I congratulate Counsel for both parties for having taken the time and it is no doubt that it's

through the time and effort of Counsel that these matters have reached the conclusion that they have.

I note that there are a number of the Petitioners in the courtroom today and I speak to you all and suggest to you to not walk out of here thinking that you might have gotten a better deal. It often occurs to people after they have purchased an article, or after an event has happened as to whether or not they did the best that they could. We all have second thoughts about many important things in our lives. The Court wanted to convey to you all that this is probably one of the more difficult, if not most difficult litigation that I have personally been involved in; that it's through the efforts of counsel that this matter has come to the conclusion that it has. Had this case cone to trial, the likelihood is that the trial would have consumed no less than a month, and possibly two months in time. It's difficult to know. The amount of documents in evidence that were involved were substantial. It would have taken the Court a minimum of a year and probably longer than that, to reach a conclusion to sift through that material and reach a conclusion. What conclusion the Court might have reached is something that no one in this room knows and that's simply because of the difficulty of the factual scenario of this case.

So, I suggest to you again to go home and when those settlement documents come to you with the numbers on them and that's the real test of whether or not you've got a settlement, you need to be willing and able to sign those settlement documents reflecting the liability that you not have the second thoughts, so you put those second

thoughts behind you and sign those documents, and get rid of this case and it will be part of the history of this matter and not be something that lives with you for the next few years, which is what will happen if this case goes to trial. And let me finally say, and Mr. Cole, you can convey this to the Petitioners who are not here, who you represent, that if they decide to not accept a settlement offer, that the Court will be back very soon and we will proceed to trial in any one of those cases to dispose of this matter. So, it's not a matter that they can put off for another year or two, or three or four years; that it's a matter that needs to, and will get disposed of immediately.

So, once again, and in conclusion, I congratulate all of you that have been involved in this settlement and I have no doubt that you made a wise choice here in doing what you've done.

If there's nothing further with respect to these dockets in the Cole and Moore dockets, I think that that will conclude this session for the purpose of those dockets.

Let's go off the record for a moment.

(Whereupon, the proceedings in the above-entitled matter were adjourned for the day at 12:01 p.m.)

o0o

UNITED STATES TAX COURT

Certificate of Transcriber and Proofreader

Case Docket No. 15854-82, et al.

Case Name Harold Giles and Donna Gibes, et al.

We, the undersigned, do hereby certify that the foregoing pages, numbers 1 through 14, inclusive, are the true, accurate and complete transcript prepared from the tape made by electronic recording by Ralph Cogswell on June 15, 1988 before the United States Tax Court at its session in Los Angeles, California, in accordance with the applicable provisions of the current verbatim reporting contract of the Court, and have verified the accuracy of the transcript by comparing the typewritten transcript against the verbal recording.

/ss/6/88
Date

/ss/
Transcriber - V/ARS, Inc.

/ss/
Date

/ss/
Proofreader - V/ARS, Inc.